86-91

No. .....

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1986

JACK JERSAWITZ,

Petitioner,

v.

THE WARDEN OF ATLANTA PENITENTIARY, WILLIAM NOONAN, AND THE UNITED STATES BUREAU OF PRISONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the government may, consistent with the First Amendment and Equal Protection guarantees, discriminate among journalists in allocating news gathering opportunities in prisons to ensure "objective" and "accurate" reporting by "responsible" newsmen.

2. Whether the government has demonstrated a constitutionally sufficient rational relationship between journalists' employment status and the asserted purpose of maintaining prison security.

LIST OF PARTIES

The parties to the proceeding below were petitioner Jack Jersawitz and respondents Jack Hanberry, Warden of the Atlanta Penitentiary, William Noonan, Executive Assistant to the Warden of the Atlanta Penitentiary, and the United States Bureau of Prisons. The individual respondents were sued solely in their official capacities.

Petitioner understands that Warden Hanberry is retiring. His successor in office will be automatically substituted as a party pursuant to Supreme Court Rule 40.3 when his identity becomes known. With this exception, the parties before this Court remain the same.

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THE WARDEN OF ATLANTA PENITENTIARY, WILLIAM NOONAN, AND THE UNITED STATES BUREAU OF PRISONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner Jack Jersawitz respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on March 10, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 783 F.2d 1532, and is reprinted in the Appendix hereto, App. 24, *infra*.

The opinion of the United States District Court for the Northern District of Georgia is reported at 610 F. Supp. 535, and is reprinted in the Appendix hereto, App. 17, *infra*.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1331, the petitioner brought this suit in the Northern District of Georgia. On April 29, 1985, the Northern District granted the respondents' motion for summary judgment, denied petitioner's motion for summary judgment, and entered a final judgment dismissing all of petitioner's claims.

On appeal, the Eleventh Circuit issued its decision on March 10, 1986, affirming the Northern District's decision. Petitioner filed a timely petition for rehearing, which was denied on April 17, 1986.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

U.S. Const. amend. I: Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. Const. amend. V: No person shall be . . . deprived of . . . liberty . . . without due process of law . . . .

U.S. Const. amend. XIV: No state[1] shall . . . deny to any person within its jurisdiction the equal protection of the laws.

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[1]The equal protection guarantees applicable to the States under the Fourteenth Amendment are incorporated and made applicable to the federal government through the due process guarantees of the Fifth Amendment. *Johnson v. Robison,* 415 U.S. 361, 364 n. 4 (1974).

28 C.F.R. 540.60 (1985): Purpose and Scope. The Bureau of Prisons recognizes the desirability of establishing a policy that affords the public information about its operations via the news media. Representatives of the news media (see § 540.2) may visit institutions for the purpose of preparing reports about the institution, programs, and activities. It is not the intent of this rule to provide publicity for as inmate or special privileges for the news media, but rather to insure a better informed public. The Bureau of Prisons also has a responsibility to protect the privacy and other rights of inmates and members of the staff. Therefore, an interview in an institution must be regulated to insure the orderly and safe operation of the institution.

28 C.F.R. § 540.2(b) (1985): "Representatives of the News Media" means persons whose principal employment is to gather or report news for:

(1) A newspaper which qualifies as a general circulation newspaper is the community in which it is published. A newspaper is one of "general circulation" if it circulates among the general public and if it publishes news of a general character of general interest to the public such as news of political, religious, commercial, or social affairs. A key test to determine whether a newspaper qualifies as a "general circulation" newspaper is to determine whether the paper qualifies for the purpose of publishing legal notices in the community in which it is located or the area to which it distributes;

(2) A news magazine which has a national circulation and is sold by newsstands and by mail subscription to the general public;

(3) A national or international news service; or

(4) A radio or television news program of a station holding a Federal Communications Commission license.

STATEMENT OF THE CASE

This case presents a challenge to the Bureau of Prisons' enforcement of press access regulations[2] governing face-to-face interviews between journalists and inmates in federal prisons. This challenge focuses on whether the government may condition access on a journalist's employment status. There is no dispute in the instant case as to any of the material underlying facts. Indeed, the parties to this action stipulated that summary judgment was appropriate because no material facts were in dispute. The record reveals the following facts:

Petitioner, an independent journalist, produces television programming for the public access channel operated by Prime Cable (f/k/a Cable Atlanta) ("Channel 12") is the City of Atlanta, Georgia. Mr. Jersawitz' regularly-scheduled programming includes a public affairs series broadcast weekly by Channel 12 called "Let's Tell It Like It Is."[3] These weekly programs consist of unscripted interviews with public officials and other public figures exploring a wide variety of topics relating to national, state, and local government, as well as other matters of public interest and concern.[4]

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[2]28 C.F.R. §§ 540.60 & 540.2(b) (1985).

[3]R. 106, 110.

[4]See R. 110.

Mr. Jersawitz' public affairs television series is broadcast weekly to a potential audience of approximately 115,000 cable television subscribers in the Atlanta metropolitan area.[5] Some viewers rely upon the program for information and opinion in reaching decisions on matters of public interest and concern.[6] Other viewers regard the program as a uniquely important source of information on matters of public interest because it is independent from major media organizations.[7]

Mr. Jersawitz was not and is not an employee of Channel 12.[8] However, his relationship with Channel 12 presents substantial safeguards. As with major corporation employees, it is essential to Mr. Jersawitz' position as a producer that he refrain from illegal or disruptive conduct if permitted access into the Atlanta Penitentiary.[9]

On October 7, 1983, Mr. Jersawitz applied to the Atlanta Penitentiary for access to interview Father Roy Bourgeois, a critic of United States foreign policy in Central America. Father Bourgeois was then temporarily incarcerated at the Penitentiary for acts of civil disobedience. Mr. Jersawitz anticipated that the interview would explore Father Bourgeois' first-hand knowledge of undisclosed and possibly illegal covert operations by agents of the United States government in El Salvador.[10] Mr.

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[5]R. 110.

[6]R. 115-116.

[7]*Id.*

[8]R. 63, 106.

[9]R. 106-07, 111.

[10]See R. 8-9.

Jersawitz proposed to videotape his interview with Father Bourgeois and broadcast it to the public via his television program.

Mr. Jersawitz' application to interview Father Bourgeois was denied. The respondents mechanically applied the media access regulation and denied access to Mr. Jersawitz solely because he was not employed by one of the media outlets sanctioned by 28 C.F.R. § 540.2(b). No investigation was made to determine whether Mr. Jersawitz posed a security risk. No informed discretion was exercised to deny Mr. Jersawitz' application. The decision to exclude Mr. Jersawitz was final, unsupported by any factual record beyond Mr. Jersawitz' employment status, and not subject to any form of administrative review.[11]

The Petitioner sought a declaratory judgment and injunctive relief from the application of the media access regulation in his case in the United States District Court for the Northern District of Georgia. The District Court decided that the respondents' selective denial of access to news gathering activities implicated no fundamental First Amendment right. Therefore, the court held that the government need not satisfy the exacting equal protection standards ordinarily applicable to classifications impinging upon the exercise of First Amendment freedoms.[12] Applying relaxed "rational basis" scrutiny, the District Court concluded that the employment-based test established in 28 C.F.R. § 540.2(b)(4) was rationally related to the gov-

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[11]R. 107.

[12]610 F. Supp. at 537.

ernment's concern for "readily ascertain[ing] the credentials and responsibility of the individual seeking prison access."[13]

On appeal, the Eleventh Circuit agreed that Petitioner's application for access to a news gathering opportunity in the Atlanta Penitentiary on an equal basis with journalists employed by major media corporations presented no "claim of constitutional magnitude."[14] Thus, the Eleventh Circuit found that the government's employment-based test for allocating news gathering opportunities was rationally related to prison security and administrative convenience and, therefore, presumptively valid under the relaxed equal protection standards applicable when no claim of constitutional dimension is presented.

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REASONS FOR GRANTING THE WRIT

Overview

Twelve years ago, this Court decided First Amendment challenges to press regulations restricting face-to-face interviews between journalists and prisoners in state and federal penitentiaries. *Pell v. Procunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). On the facts presented, a divided Court held that "newsmen have no right of access to prisons or their inmates beyond that afforded the general public." *Pell*, 417 U.S.

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[13]610 F. Supp. at 538.

[14]783 F.2d at 1534.

at 834; *Saxbe,* 417 U.S. at 850. Therefore, the court concluded that a content-neutral ban on face-to-face interviews, imposed even-handedly, did not abridge First Amendment guarantees.

In the wake of *Pell* and *Saxbe*, and perhaps out of respect for the views forcefully advanced by the dissenting Justices that an absolute ban on prisoner-press interviews "impermissibly burdens First Amendment freedoms," *Saxbe,* 417 U.S. at 850 (Powell, J. dissenting), the Bureau of Prisons rewrote its regulations governing press access to prisons in 1976. These rewritten regulations[15] expressly acknowledge "the desirability of establishing a policy that affords the public information about [prison] operations via the news media" and recite that their underlying purpose is "to insure a better informed public."[16]

To harmonize this purpose with its concerns for security and administrative convenience, the Bureau adopted an employment-based test[17] for granting or withholding access to news gathering opportunities in federal prisons. Under this test, employees of major media outlets are granted access while journalists who are independent of major media employers are denied access. The government's admitted purpose in drawing the distinction on this basis was "to ensure *objective* or *accurate* reporting by responsible newsmen."[18]

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[15]28 C.F.R. § 540, *et seq.*, reprinted *supra* in Statutes and Regulations Involved.

[16]28 C.F.R. § 540.60.

[17]28 C.F.R. § 540.2(b).

[18]This statement of the Bureau's purpose (emphasis supplied) is contained in the respondent's brief to the Eleventh Circuit, at 11. It is fully supported by record evidence. R. 78.

This challenge to the Bureau's press access regulations presents issues that are neither raised in nor controlled by *Pell* and *Saxbe*. The challenged regulations go beyond the *evenhanded* absolute ban on interviews upheld in *Saxbe;* they impose a *selective* ban designed to further news presentation the Bureau deems "objective or accurate" by journalists the Bureau deems "responsible." Here, the petitioner challenges the Bureau's authority under the First and Fifth Amendments to make and enforce these distinctions among news gatherers on the basis of employment status. The erroneous disposition of his case by the Eleventh Circuit warrants review on a writ of certiorari because: (1) the decision below conflicts in principle with the decisions of this Court and federal courts in other Circuits; and (2) the issues presented are of exceptional importance.

I. The decision below conflicts in principle with decisions of this Court and federal courts in other Circuits.

This Court recently decided *City of Los Angeles v. Preferred Communications, Inc.*, 54 U.S.L.W. 4542 (June 2, 1986), a dispute over the city's refusal to grant access to public utility poles and conduits for use by a cable television company. The cable company alleged that the city permitted access to licensed cable operators and that excess physical capacity existed on the utility structures. The Court unanimously held that these allegations stated a viable claim under the First Amendment. In reaching that conclusion, the Court reiterated the familiar principles applicable whenever government assumes the role of allocating opportunities to exercise First Amendment rights:

> Where a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force. This Court 'may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.'

54 U.S.L.W. at 4544 (citations omitted).

Federal courts reviewing press access regulations in various contexts have consistently recognized that First Amendment concerns are implicated when government regulates news gathering. *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977); *Quad-City Community News Service, Inc. v. Jebens*, 334 F. Supp. 8, 14-16 (S.D. Iowa 1971). *See also Borreca v. Fasi*, 369 F. Supp. 906 (D.C. Hawaii 1974); *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n.*, 365 F. Supp. 18 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); *Lewis v. Baxley*, 368 F. Supp. 768 (M.D. Ala. 1973); *Kovach v. Maddux*, 238 F. Supp. 835 (M.D. Tenn. 1965); *Cable News Network Inc. v. ABC*, 518 F. Supp. 1238 (N.D. Ga. 1981); *Westinghouse Broadcasting v. National Transportation Safety Board*, 8 Media L. Rptr. 1177 (D.C. Mass. 1982). Accordingly, each of the foregoing cases applies exacting scrutiny, as opposed to the "rule of rationality," in analyzing the constitutionality of regulations that discriminate among news gatherers in the allocation of news gathering opportunities.

For example, in *Sherrill v. Knight*, a journalist challenged The White House Press Office's refusal to grant

him access to news gathering opportunities at The White House. The government argued, as it does here, that the denial of access was presumptively valid because: (1) no content-based discrimination was apparent; and (2) since journalists had no greater right of access than the general public, no First Amendment interest warranted the application of more exacting scrutiny. 569 F.2d at 129. The D.C. Circuit disagreed. It held that because The White House had voluntarily granted access to some journalists, it was constitutionally prohibited from denying access "arbitrarily or for less than *compelling* reasons." *Id.* (emphasis supplied).

None of these cases addresses the issue of access to news gathering opportunities in prisons. However, in each of these cases, governmental concerns for security and administrative convenience were undeniably significant. Current events and recent history—from the violent assault on the United States House of Representatives during the Truman Administration to repeated presidential assassination attempts to bombing incidents at the United States Capitol—establish that the governmental concerns for maintaining security in the press galleries of The White House, the Congress, and the State legislatures are realistic and justified. The task of policing the security of these governmental institutions is unquestionably difficult. Nevertheless, restrictions on press access in those fora have uniformly been treated as matters of "constitutional magnitude." *See Sherrill v. Knight, supra; Lewis v. Baxley, supra.*

The task of prison security presents different considerations and problems than, for example, maintaining

security at The White House. These differences do not, however, warrant the application of a different constitutional standard when government encroaches on the free flow of information on matters of public interest and concern in the name of security. Yet, while federal courts around the country have been applying exacting scrutiny to restrictions on press access, the Eleventh Circuit declared the challenged press access at issue as presumptively valid under the "rule of rationality."[19]

The opinion below, both in analysis and result, conflicts in principle with each of the decisions cited above. It applies "the rule of rationality" to sustain a regulation that undeniably restricts an activity deserving of First Amendment protection.[20] After prevailing in its

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[19]The Eleventh Circuit's application of this relaxed standard of scrutiny also appears erroneous under this Court's recent decisions reviewing classifications that bear, at best, and attenuated relationship to the governmental purposes justifying their existence. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. —, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *Plyler v. Doe*, 457 U.S. 202 (1982); *Zobel v. Williams*, 457 U.S. 55 (1982).

[20]A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives. 9 *Writings of James Madison* 103 (G. Hunt ed. 1910).

It is not sufficient, therefore, that the channels of communications be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance.

(Continued on following page)

position that an absolute ban on press-prisoner interviews could be squared with the First Amendment, the Bureau of Prisons voluntarily yielded to limited press access in recognition of the strong First Amendment interest implicated when government controls the flow of information available to the public. As the dissents in *Pell* and *Saxbe* frankly acknowledge, there is no dispute over the government's power to limit access to prisons. However, when the government exercises this power to pick and choose among news gatherers for the admitted purpose of producing a presentation of news the government deems "objective" and "accurate," a colorable First Amendment claim lies. Thus, under *City of Los Angeles*, the "rule of rationality" is inapplicable and a more exacting scrutiny is required.

Embedded in the First Amendment is a presumption that when government intrudes on the exercise of protected constitutional liberties to advance a paramount governmental interest, it will do so in an evenhanded manner.[21] This Court has repeatedly applied exacting

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For that reason information gathering is entitled to some measure of constitutional protection. *Houchins v. KQED, Inc.*, 438 U.S. 1, 31-32 (1978) (Stevens, J., dissenting).

Press-Enterprise Co. v. Superior Court of California for the County of Riverside, 54 U.S.L.W. 4869, 4874 (June 30, 1986) (Stevens, J., dissenting). *See also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

[21]*See Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1525 (11th Cir. 1985) *cert. denied*, — U.S. —, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986); Karst, *Equality As A Central Principle In The First Amendment*, 43 U. Chi. L. Rev. 20 (1975).

scrutiny to invalidate classifications that purport to allocate opportunities to exercise First Amendment rights on a discriminatory basis. *City of Madison, Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). *See also, Carey v. Brown*, 447 U.S. 455 (1980).

The Bureau of Prisons violated this fundamental principle of First Amendment equality by advancing a classification that, by the Bureau's own admission, is designed to assure "objective or accurate reporting by responsible newsmen." The First Amendment disables government from pursuing that purpose. The Fifth Amendment prohibits government from selectively allocating news gathering opportunities except to meet a compelling state interest. In dismissing these concerns by labelling them of insufficient "constitutional magnitude," the Eleventh Circuit's opinion marks a dangerous expansion of government's power to censor the flow of information about governmental operations. Therefore, it warrants careful reexamination.

The opinion below creates and invites confusion over the legal analysis federal courts should apply in determining the constitutional limits on government's power to discriminate among journalists in allocating news gathering opportunities. Therefore, the Court is urged to review this case on certiorari and resolve the existing confusion over the legal analysis applicable to press access regulations.

II. The issues presented are of exceptional significance.

This Court has been called upon frequently to resolve the conflicts that repeatedly arise in an open society between the task of administering governmental functions effectively and the aspiration of maximizing the flow and diversity of information to a public charged with the responsibility of self-government. *E.g., New York Times Co. v. United States,* 403 U.S. 713 (1971); *Gannett Co., Inc., v. DePasquale,* 443 U.S. 368 (1979); *Houchins v. KQED, Inc.,* 438 U.S. 1 (1978); *Nixon v. Warner Communications, Inc.,* 435 U.S. 589 (1978).

Because these conflicts touch such fundamental national concerns, confusion over the legal standards federal courts should apply to resolve them is intolerable. Therefore, it is necessary and appropriate that this Court hear and decide cases that address such conflicts.

This case presents a clear conflict between the asserted complexities of operating the federal prison system and the public's access to a diverse selection of journalistic viewpoints on matters of public interest and concern in the federal prisons. The Bureau of Prisons has voluntarily relented from the position it asserted and sustained in *Saxbe* and *Pell;* it now allows limited press access. Unfortunately, in relenting, the Bureau has designed a regulation premised on an unconstitutional motive and lacking a rational connection to legitimate security concerns.

The regulation at issue applies nationwide to all federal prisons and to all journalists seeking access to prison interviews. As communications technology advances and the channels for gathering and reporting news change accordingly, the functional and constitutional inadequacies

in the Bureau's 1976 regulation will become increasingly apparent. Of course, the fundamental constitutional flaw in the regulation—its irrational presumption that a journalist's employment status is a reliable predictor of his propensity to present a prison security risk—is clearly framed and ripe for decision in this case. Therefore, the Court should exercise its discretion to review the dispute over this regulation presented in this case and, by so doing, resolve future confusion over the legal analysis applicable to press access regulations.

CONCLUSION

For the reasons set forth herein. this petition for certiorari should be granted.

This 16th day of July, 1986.

Respectfully submitted,

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APPENDIX

Jack JERSAWITZ, Plaintiff,

v.

Jack HANBERRY, et al., Defendants.

Civ. A. No. C83-2202A.

United States District Court,
N.D. Georgia,
Atlanta Division.

April 29, 1985.

Independent journalist brought action challenging Bureau of Prisons' regulations governing federal prisoners' contact with the news media. The District Court, Robert H. Hall, J., held that: (1) regulations limiting federal prisoners' contact with representative of news media to journalists employed by and responsible to recognized media organizations did not violate equal protection, and (2) warden did not abuse his discretion in denying admittance to independent journalist.

Summary judgment in favor of defendants.

Joseph M. Beck and Norman P. Stein, Jeffrey O. Bondurant, Miller, Hishon & Stephenson, Atlanta, Ga., for plaintiff.

Barbara V. Tinsley, Asst. U.S. Atty., Atlanta, Ga., for defendants.

ORDER

ROBERT H. HALL, District Judge.

This action is presently before the court on the parties' cross-motions for summary judgment. Federal jurisdiction is predicated upon the existence of a federal question, 28 U.S.C. § 1331 (West Supp. 1984). For the

reasons stated herein, defendants' motion for summary judgment is GRANTED and plaintiff's motion for summary judgment is DENIED.

FACTUAL BACKGROUND

The parties to this action have stipulated that summary judgment is appropriate because the facts are not in dispute. On October 7, 1983, plaintiff requested permission to interview a particular inmate who was temporarily confined at the Atlanta Federal Penitentiary. Plaintiff sought the interview for use on a self-produced television show called "Let's Tell It Like It Is," which airs via a public access channel provided by Cable Atlanta. Plaintiff is not employed by Cable Atlanta nor is he subject to its control or supervision; instead he considers himself an independent journalist.

Warden Hanberry of the Atlanta Federal Penitentiary denied plaintiff's request to interview the specified inmate. The Warden based this denial on the fact that plaintiff did not qualify as a "representative of the news media" under the applicable Bureau of Prisons' definition, 28 C.F.R. § 540.2(b) (1984). Plaintiff admits that he is not a "representative of the news media" as defined by the regulation.

The Bureau of Prisons' regulations governing federal prisoners' contact with the media are embodied in 28 C.F.R. § 540.60, *et seq.* (1984). Those regulations permit, under certain conditions, "representatives of the news media" to conduct interviews with prisoners incarcerated in federal penal institutions, including the Atlanta Penitentiary. The regulations define "representatives of the news media" as follows:

Persons whose principal employment is to gather or report news for:

1) A newspaper which qualifies as a general circulation newspaper in the community in which it is published. A newspaper is one of "general circulation" if it circulates among the general public and if it publishes news of a general character of general interest to the public such as news of political, religious, commercial, or social affairs. A key test to determine whether a newspaper qualifies as a "general circulation" newspaper is to determine whether the paper qualifies for the purpose of publishing legal notices in the community in which it is located or the area to which it distributes;

2) A news magazine which has a national circulation and is sold by newsstands and by mail subscription to the general public;

3) A national or international news service; or

4) A radio or television news program of a station holding a Federal Communications Commission license.

28 C.F.R. § 540.2(b).

Plaintiff originally brought this action seeking a mandamus ordering the warden to admit him to the Atlanta Penitentiary for the purpose of interviewing the inmate. During the pendency of the proceedings, the inmate was transferred from the Atlanta Penitentiary to his designated place of confinement. The court therefore ruled that the mandamus issue was moot.

Subsequently plaintiff filed an amended complaint in which he seeks the following: (1) a declaratory judgment that 28 C.F.R. § 540.60 *et seq* is "unconstitutional insofar as it distinguishes between plaintiff and 'representatiaves

of the media' " (Plaintiff's Complaint, ¶ 1); (2) an order permanently enjoining defendants from denying plaintiff the privilege of interviewing prisoners at the Atlanta Penitentiary for the reason that he is not a "representative of the media"; and (3) an order requiring the defendants to either bring the inmate to Atlanta for an interview or to pay to transport plaintiff to the inmate's place of confinement for an interview. By order dated February 6, 1985, the court granted plaintiff leave to file the brief of the Atlanta Press Club, an amicus curiae.

DISCUSSION

As noted earlier, the parties have agreed that summary judgment is appropriate in this case. The issue before the court, therefore, is whether the prison regulations, 28 C.F.R. § 540.60 *et seq.*, are unconstitutional, as plaintiff alleges.

Plaintiff has alleged that the regulations violate both the First and the Fifth Amendments to the United States Constitution. Specifically, plaintiff alleges that the regulations violate the First Amendment "by denying plaintiff a privilege extended to segments of the general public, to wit the privilege of 'representatives of the news media' to interview prisoners. . . ." and by "distinguishing and classifying among different categories of the press. . . ." (Plaintiff's Complaint, Count 1, ¶¶ a and b). While these allegations purport to state a First Amendment violation, it appears to the court that they more correctly allege an equal protection violation. The Supreme Court has held that restrictions on media access to prisons do not abridge the First Amendment's guarantee of freedom of the press. *Pell v. Procunier,* 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1973); *Saxbe v. Washington Post Co.,* 417 U.S. 843, 94 S.Ct.

2811, 41 L.Ed.2d 514 (1974). In any event this case, unlike *Pell* and *Saxbe,* does not present a case of prison regulations totally prohibiting the press from interviewing prisoners, instead the question in this case is whether the regulations' classifications are constitutionally valid. For this reason the court will focus on plaintiff's claims of a Fifth Amendment violation.

In Count II of his complaint, plaintiff alleges that the regulations "violated the Due Process Clause of the Fifth Amendment to the United States Constitution by granting privileges to selected categories of the media while denying them to plaintiff." In his motion for summary judgment plaintiff contends that the government must have a compelling state interest in order to validate the classifications. This standard is simply not the correct standard by which to judge the regulations. As the Atlanta Press Club correctly notes in its amicus brief, the proper standard by which to measure the regulations is whether the government has a rational basis for its actions. The "compelling state interest" analysis only arises in cases involving government action which implicates a constitutional right or affects a suspect class. Clearly the class to which plaintiff belongs, i.e., independent journalists, is not a suspect class under relevant procedents, nor does this case implicate fundamental constitutional rights. As noted earlier, the Supreme Court has held that freedom of the press is not abridged by restrictions on prison access. *Pell; Saxbe, supra.* The court has no choice but to interpret these cases as holding that there is no fundamental right to enter prisons to gather news.[1]

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1. While this court feels that the better analysis would have been to recognize the First Amendment right, but to acknowledge that the government has compelling reasons for the restrictions, this does not appear to be the analysis employed by the Court in *Pell* and *Saxbe*. This court has no choice but to abide by these decisions.

The issue before the court, therefore, is whether the government has a rational basis for defining "representatives of the news media" as it does, thereby excluding plaintiff and other journalists like him. This analysis will focus only on that portion of the regulation's definition which is applicable to plaintiff, i.e. 28 C.F.R. § 540.2(b)(4). According to the government its definition is necessary in order to insure "limited access for interviews while insuring that the representatives would be responsible persons employed by and responsible to recognized media organizations." (Defendants' Brief in Support of Motion for Summary Judgment, p. 5). Its definition, i.e., the requirement of affiliation with a federally recognized and licensed media organization, enables the prison to readily ascertain the credentials and responsibility of the individual seeking prison access. Given the prisons' obvious need to maintain security and order within the prisons, and the need for administrative ease in implementing visitor regulations, this court holds that the government does in fact have a rational basis for its classifications. [2]

---

2. The Atlanta Press Club makes two arguments to which the court deems a response necessary. The club contends that the government could have devised a better method of insuring administrative ease. While this may be true, the government need not devise the best system possible but merely have a rational basis for the system it does devise. Second, the club argues that the regulations are vague and ambiguous. In making this argument the club points only to portions of the statute which are not at issue in this case. Neither plaintiff nor the amicus have standing to challenge the constitutionality of portions of the regulation which are not relevant to the case, when the regulation as it applies to plaintiff (i.e., § 540.2(b)(4)) is not, and is not even alleged to be, vague or ambiguous. Federal courts are not in the business of rendering advisory opinions. *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947).

Plaintiff also contends that although he did not qualify for admittance as a "representative of the news media," he should have been granted entry under the warden's discretionary power to allow members of the general public admittance. In this case the warden, in the exercise of his discretion, chose not to admit plaintiff as a non-qualifying reporter or member of the general public. In order to find this decision improper the court would have to determine that the warden's decision was an abuse of his discretion, i.e., either arbitrary or capricious. Plaintiff has presented no evidence whatsoever to support such a finding. Defendants, on the other hand, have shown that such is not the case. According to Warden Hanberry, he does not allow persons, other than those recognized by the regulations, inside the prison unless they "demonstrate exceptional circumstances which satisfy [his] concern regarding the security and unhampered administration of the prison." (Hanberry Affidavit, ¶ 5). Warden Hanberry further states that plaintiff did not "present facts . . . which allowed [the warden] to determine that admitting him . . . would not compromise the security or administration of the Atlanta Federal Penitentiary." (*Id.*, ¶ 6). On the uncontroverted evidence before it, the court finds no abuse of discretion in Warden Hanberry's actions.

The court has determined that the prison regulations at issue, 28 C.F.R. § 540.60 *et seq*, are not unconstitutional as alleged by plaintiff. For this reason plaintiff is not, and was not, entitled to an interview with the inmate he specified. There is no basis, therefore, for ordering the demanded transportation to enable plaintiff to conduct the interview. The court hereby GRANTS summary judgment in favor of defendants on all of plaintiff's claims.

Jack JERSAWITZ, Plaintiff-Appellant,

v.

Jack HANBERRY, et al.,

Defendants-Appellees.

No. 85-8434.

United States Court of Appeals,
Eleventh Circuit.
March 10, 1986.
Rehearing and Rehearing En Banc
Denied April 17, 1986.

A self-styled independent journalist sought a declaratory judgment that a prison regulation which limited interviews with inmates to representatives of the news media whose principal employment was to gather or report news for a radio or television news program of the station holding a FCC license was unconstitutional insofar as it distinguished between the defined representatives of the news media and himself. The United States District Court for the Northern District of Georgia, 610 F.Supp. 535, Robert H. Hall, J., upheld the constitutionality of the regulation, and the plaintiff appealed. The Court of Appeals, Dyer, Senior Circuit Judge, held that Bureau of Prisons regulation did not create an arbitrary classification in violation of the equal protection rights of a producer of an editorial-type television show which utilized a public access cable channel which was independent from major media organizations and which exercised little, if any, control over the programming.

Affirmed.

Jeffrey O. Bramlett, Atlanta, Ga., Norman P. Stein, University, Ala., Gary A. Ratner, Michael J. Gerhardt, Atlanta, Ga., for plaintiff-appellant.

Robert Tayloe Ross, Asst. U.S. Atty., Atlanta, Ga., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before JOHNSON and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

DYER, Senior Circuit Judge:

Plaintiff Jersawitz, a self-styled independent journalist, sought a declaratory judgment against the Warden and another official of the Atlanta Penitentiary, that a prison regulation which limits interviews with inmates to representatives of the news media whose principal employment is to gather or report news for a radio or television news program of a station holding a Federal Communications Commission license is unconstitutional insofar as it distinguishes between Jersawitz and the defined representatives of the news media. The district court, 610 F.Supp 535 (1985), upheld the constitutionality of the regulation and granted summary judgment for the defendants. We affirm.

The facts are undisputed. Jersawitz self-produces an editorial-type television show called "Let's Tell It Like It Is" and utilizes a public access channel operated by Prime Cable, Channel 12, Atlanta to project his show. He was not and is not an employee of Channel 12. In fact he has never been employed by anyone to gather or report news. The station is independent from major me-

dia organizations and, according to Jersawitz, any citizen can walk in off the street and utilize the facilities of public access free of charge. Channel 12 does not ordinarily supervise the taping of anyone's shows, and it exercises little, if any, control over the programming.

Jersawitz requested permission to interview Father Bourgeois, a critic of United States foreign policy, who was a prisoner confined in the Atlanta Federal Penitentiary. He intended to tape and then replay the interview on his show. The Warden denied Jersawitz access to the penitentiary on the ground that he was not a representative of the news media as that term is defined in the media access regulation established by the Bureau of Prisons, 28 C.F.R. Section 540.2(G)(4). The regulation governs federal prisoners contact with the media and defines representatives of the news media in pertinent part "as . . . persons whose principal employment is to gather or report news for . . . a radio or television news program of a station holding a Federal Communications license." Jersawitz concedes that he is not a representative of the news media as defined by the regulation.

The district court, in upholding the constitutionality of the regulation, applied the traditional rational relationship test in evaluating the challenge to the regulation, concluding that a compelling state interest analysis proposed by Jersawitz was inappropriate because the case neither involved a suspect class nor implicated fundamental constitutional rights. The court found that the Bureau of Prisons had a rational basis for its classification and granted the Bureau of Prisons' motion for summary judgment.

Jersawitz' basic attack on the constitutionality of the Bureau of Prisons regulation is that it does not give even-handed treatment to journalists, that is, if the Bureau of Prisons admits some journalists to the penitentiary for a face-to-face interview with a certain inmate, it must let all journalists in for the same purpose absent a showing of compelling state interest. Jersawitz contends that the regulation is unconstitutional because is discriminates among journalists based upon their employment status.

At the outset we note that there is nothing in the record to indicate that the difference in classification in the regulation, i.e. those journalists who may, and those who may not gain access to the Atlanta Federal Penitentiary, is content based. Nor is there any evidence of bad faith on the part of the government in adopting such a classification.

We need not pause long to dispose of the First Amendment claim. It is now settled without peradventure that newsmen have no constitutional rights of access to prisons or their inmates beyond that afforded the general public. *Pell v. Procunier*, 417 U.S. 817, 834, 94 S.Ct. 2800, 2810, 41 L.Ed.2d 495 (1974); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 94 S.Ct. 2811, 41 L.Ed.2d 514 (1974). Accepting the holding in these cases as he must, Jersawitz turns to the Equal Protection Clause and argues that *Pell* and *Saxbe* are distinguishable from this case because in both of those cases the restrictions to access were on an even-handed basis, and the journalists were therefore no more disabled than the general public. Yet when the Bureau of Prisons here says that it is in the public interest to grant face-to-face interviews with inmates, but that to insure fair and accurate reporting the Bureau of Prisons will

decide which journalists are fair and objective, it oversteps the even-handed approach under the equal protection guarantee.

Jersawitz' argument states, then builds upon a slanted premise. The regulation was not adopted for the purpose of providing, nor can it be construed to mean, that the Bureau of Prisons could give or withhold access to the Atlanta Maximum Security Penitentiary simply on its decision whether or not a newsman would report fairly and objectively. In clear terms the regulation recognizes the need for the prison to maintain security and order within the prison and allow limited access for interviews by insuring that the representatives of the news media are responsible persons employed by and responsible to recognized media organizations. This permits the prison facility to identify those persons who are not likely to pose any threat to security without the facility having to conduct extensive individual investigations of each applicant. Thus, it provides the public with an objective and accurate news presentation by a person whose profession is gathering and reporting news without the likelihood of breaching the prison's security. Jersawitz contends that this is not enough. Since the Bureau of Prisons grants the privilege to selected categories of the media while denying it to him, the regulation violates the Equal Protection Clause unless the Bureau of Prisons can show a compelling state interest to validate the classifications, and this it has failed to do. We agree with the district court that he compelling state interest analysis only arises in cases involving governmental action which implicates a constitutional right or affects a suspect class. This case does not involve a claim of constitutional magnitude, a suspect class, in-

vidious discrimination, or any other matter that would require strict scrutiny of the Bureau of Prisons regulation here at issue.

We have no difficulty in agreeing with the district court's holding that the Bureau of Prisons regulation is rationally related to the Bureau of Prisons "obvious need to maintain security and order with the prison, and the administrative need in implementing visitor regulations." This is especially true, where, as here, we are dealing with a maximum security penitentiary. It is undeniable that the administration of the penal system is a task of monumental proportions, *Block v. Rutherford*, 468 U.S. 576, 104 S.Ct. 3227, 3231, 82 L.Ed.2d 438 (1984), and that the necessity to preserve order and authority in the prisons is self-evident. *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 132, 97 S.Ct. 2532, 2541, 53 L.Ed.2d 629 (1977). Security is the prime concern and is central to all other correctional goals, *Pell, supra*, 417 U.S. at 823, 94 S.Ct. at 2804. As pointed out in *Bell v. Wolfish*, 441 U.S. 520, 547-48, 99 S.Ct. 1861, 1878, 60 L.Ed.2d 447 (1979):

[T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. (Citations omitted). "Such considerations are peculiarly within the province of professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these

considerations, courts should ordinarily defer to their expert judgment in such matters. *Pell v. Procunier,* 417 U.S. at 827 [94 S.Ct. at 2806]."

We cannot say that the Bureau of Prisons in any way exaggerated the legitimate concern or abused its discretion in promulgating the regulation in question.

Finally Jersawitz contends that to sustain a classification system that differentiates between members of the news media on the basis of their employment, the government must demonstrate that it selected the regulatory path least restrictive of a constitutionally protected interest. As we have already said, this case does not involve a claim of constitutional magnitude. In any event, this argument was peremptorily disposed of in *Block v. Rutherford, supra,* 104 S.Ct. at 3235 n. 11, in which the court said, "We reaffirm that administrative officials are not obliged to adopt the least restrictive means to meet their legitimate objectives" (citing *Bell v. Wolfish,* 441 U.S. 542 n. 25, 99 S.Ct. 1876 n. 25.).

We conclude that the challenged Bureau of Prisons regulation does not create an arbitrary classification in violation of Jersawitz' right to equal protection of the law. The regulation bears a rational relationship to the objective of maintaining order and security in the maximum security Atlanta Federal Penitentiary while granting limited access to the prison to interview fact-to-face designated inmates by "representatives of the news media" as they are defined in the regulation. *See Johnson v. Robinson,* 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974).

AFFIRMED.

Supreme Court, U.S.
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No. 86-91

In the Supreme Court of the United States

OCTOBER TERM, 1986

JACK JERSAWITZ, PETITIONER

v.

THE WARDEN OF ATLANTA PENITENTIARY, WILLIAM NOONAN, AND THE UNITED STATES BUREAU OF PRISONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that a Bureau of Prisons regulation governing media access to federal prisoners impermissibly discriminates among broadcast journalists.

1. Petitioner, a self-styled independent journalist, sought a judgment declaring unconstitutional a Bureau of Prisons regulation governing press access to federal prisoners. The United States District Court for the Northern District of Georgia upheld the constitutionality of the regulation and granted summary judgment to respondents (Pet. App. 1-7). The court of appeals affirmed (*id.* at 8-14).

a. The pertinent facts are summarized in the opinion of the court of appeals (Pet. App. 9-10). Petitioner produced an editorial-type television show called "Let's Tell It Like It Is." He utilized a public access channel operated by Prime Cable, Channel 12, in Atlanta to project his show. He was not an employee of Channel 12 and had never been employed by anyone to gather or report news. Channel 12 is independent of any major media organization. Any

citizen can walk in off the street and utilize the facilities of public access free of charge. Channel 12 does not ordinarily supervise the taping of anyone's show, and it exercises little, if any, control over programming.

Petitioner requested permission to interview Father Roy Bourgeois, a critic of United States foreign policy, who was a prisoner confined in the Atlanta Federal Penitentiary. Petitioner intended to tape and then replay the interview on his show. The warden denied petitioner access to the penitentiary on the ground that he was not a "representative of the news media" as that term is defined in the media access regulation established by the Bureau of Prisons, 28 C.F.R. 540.2(b). The regulation governs federal prisoners' contact with the media and defines "Representatives of the News Media" as:

> [P]ersons whose principal employment is to gather or report news for:
>
> (1) A newspaper which qualifies as a general circulation newspaper in the community in which it is published. A newspaper is one of "general circulation" if it circulates among the general public and if it publishes news of a general character of general interest to the public such as news of political, religious, commercial, or social affairs. A key test to determine whether a newspaper qualifies as a "general circulation" newspaper is to determine whether the paper qualifies for the purpose of publishing legal notices in the community in which it is located or the area to which it distributes;
>
> (2) A news magazine which has a national circulation and is sold by newsstands and by mail subscription to the general public;
>
> (3) A national or international news service; or

> (4) A radio or television news program of a station holding a Federal Communications Commission license.

Petitioner concedes that he is not a "representative of the news media" as defined by the regulation.

b. Petitioner's complaint alleged essentially that the prison regulation improperly discriminates among journalists based on their employment. The district court rejected petitioner's First Amendment claim on the ground that "restrictions on media access to prisons do not abridge the First Amendment's guarantee of freedom of the press" (Pet. App. 4). With respect to the equal protection issue, the court concluded that the case did not involve a suspect class or implicate fundamental constitutional rights. Accordingly, the court rejected the "compelling state interest" analysis proposed by petitioner; instead, the court applied the "rational relationship" test. *Id.* at 3-6. The court found that the regulation met that test (*id.* at 6 (footnote omitted)):

> [T]he requirement of affiliation with a federally recognized and licensed media organization[] enables the prison to readily ascertain the credentials and responsibility of the [journalist] seeking prison access. Given the prisons' obvious need to maintain security and order within the prisons, and the need for administrative ease in implementing visitor regulations, this court holds that the government does in fact have a rational basis for its classifications.

c. The court of appeals affirmed (Pet. App. 8-14). Like the district court, it held that the regulation presented no First Amendment problem. The court of appeals explained that, under this Court's decisions in *Pell* v. *Procunier*, 417 U.S. 817 (1974), and *Saxbe* v. *Washington Post Co.*, 417 U.S. 843 (1974), "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public" (Pet. App. 11).

cation * * * be rationally related to a legitimate state interest." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (per curiam). As discussed above, no fundamental right is implicated in this case, and petitioner does not contend that he belongs to a suspect class. Accordingly, the challenged regulation "need only rationally further a legitimate state purpose." *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983).

The courts below were also clearly correct in concluding that the Bureau's regulation had a rational relationship to a legitimate state interest. Indeed, the Bureau of Prisons regulation passes constitutional muster even under the strict scrutiny standard. The evidence established that the regulation's purpose in requiring radio or television journalists to be employed by an FCC licensee is to enable the prison to identify those journalists who are not likely to pose any threat to prison security without having to conduct extensive and cumbersome individual investigations of each applicant. Pet. App. 6, 12-14; Affidavit of Ira Kirschbaum, Acting General Counsel of the Bureau of Prisons (Kirschbaum Affidavit (R. 77-80)). The interests of the prison system in maintaining security and order in the prisons—particularly in a maximum security prison such as the one at issue here (see Pet. App. 13)—and in the effective administration of visitor regulations are compelling. As the Court observed in *Pell*, prison security is "central to all other correctional goals" (417 U.S. at 823), and "[s]uch considerations are peculiarly within the province and professional expertise of corrections officials" (*id.* at 827). Given the expense and burden of case-by-case review of each journalist's credentials and record, there appears to be no less restrictive alternative;[3] certainly petitioner suggests none. For the regulation at issue to have any

[3] If the prison system may not adopt such regulations as it deems necessary in order to limit the security risk inherent in allowing press access to inmates, it might choose to withdraw completely the special

value or purpose, it must draw a line somewhere to distinguish the press from the general public.[4] We note finally that there is nothing to suggest that petitioner may not communicate with prisoner Bourgeois through alternative methods, such as by correspondence or telephone (see 28 C.F.R. 540.10 *et seq.*, 540.100 *et seq.*).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

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privileges accorded the press to conduct inmate interviews—which it lawfully could do under *Pell* and *Saxbe*.

[4] The press definition in the regulation is similar to that endorsed by Justice Powell in his dissent in *Saxbe*, wherein he recognized the difficulties in proceeding on a case-by-case basis. 417 U.S. at 873-874.

[5] Petitioner argues (Pet. 8) that the regulation has the impermissible purpose under the First Amendment of assuring " 'objective or accurate reporting by responsible newsmen' " (quoting Gov't Br. App. 11; see also *id.* at 18; Kirschbaum Affidavit (R. 78)). But this seizes upon some isolated references and ignores the clear thrust of the regulation's origin and design. As the court of appeals expressly found (Pet. App. 12), "[t]he regulation was not adopted for the purpose of providing, nor can it be construed to mean, that the Bureau of Prisons could give or withhold access to the Atlanta Maximum Security Penitentiary simply on its decision whether or not a newsman would report fairly and objectively." Rather, the regulation is motivated by the " 'obvious need to maintain security and order with[in] the prison[s], and the need for administrative ease in implementing visitor regulations' " (*id.* at 13 (quoting district court opinion, *id.* at 6)). Even if the regulation were based in part on the purpose petitioner ascribes to it, and assuming arguendo that this purpose is illegitimate, still the presence of the legitimate purpose dictates that the regulation should be upheld. Cf. *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 284-287 (1977).

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Five days after Petitioner filed for certiorari in this Court, the Third Circuit Court of Appeals, sitting en banc, issued its opinion in *Capital Cities Media, Inc. v. Chester.*[1] The Third Circuit's decision in *Capital Cities Media* conflicts in principle with the Eleventh Circuit's decision here. This recent development and the Respondent's contention that certiorari should be denied because Mr. Jersawitz "is not a bona fide journalist"[2] deserve careful examination.

---

1 No. 85-5132 (3d Cir., July 21, 1986) (en banc).

2 Memorandum for the Respondents in Opposition at 5, n. 2.

1. The Third Circuit's Decision in Capital Cities Media Conflicts In Principle With The Eleventh Circuit's Treatment of Mr. Jersawitz' Equal Protection Claim.

Despite the glaring conflict in principle between this case and the decisions of this Court,[3] the Third Circuit,[4] the District of Columbia Circuit,[5] and various district courts,[6] the Respondents oppose review by certiorari. The equal protection analysis applied by the Eleventh Circuit in this case squarely conflicts with the recent decision of the Third Circuit in *Capital Cities Media.*

In *Capital Cities Media,* a Pennsylvania newspaper sued for access to information in the hands of the Pennsylvania Department of Environmental Resources ("D.E.R."). Like Mr. Jersawitz, the newspaper advanced two claims: (1) a First Amendment right-of-access claim; and

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[3] *City of Los Angeles v. Preferred Communications, Inc.,* 54 U.S.L.W. 4542 (June 2, 1986).

[4] *Capital Cities Media, Inc. v. Chester,* No. 85-5132 (3d Cir., July 21, 1986) (*en banc*).

[5] *Sherrill v. Knight,* 569 F.2d 124 (D.C. Cir. 1977).

[6] *Quad-City Community News Service, Inc. v. Jebens,* 334 F. Supp. 8, 14-16 (S.D. Iowa 1971). *See also Borreca v. Fasi,* 369 F. Supp. 906 (D.C. Hawaii 1974); *Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n.,* 365 F. Supp. 18 (D.D.C. 1973), *rev'd on other grounds,* 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1051 (1976); *Lewis v. Baxley,* 368 F. Supp. 768 (M.D. Tenn. 1965); *Kovach v. Maddux,* 238 F. Supp. 835 (M.D. Tenn. 1965); *Cable News Network, Inc. v. ABC,* 518 F. Supp. 1238 (N.D. Ga. 1981); *Westinghouse Broadcasting v. National Transportation Safety Board,* 8 Media L. Rptr. 1177 (D.C. Mass. 1982).

(2) an equal protection claim. The district court dismissed both claims.

The Third Circuit agreed that the First Amendment conferred no right of access to the sought-after information. Noting this Court's holdings in *Pell* and *Saxbe,* the Third Circuit ruled that the newspaper had no greater right of access to the information than did the public generally.[7]

However, the Third Circuit vacated the dismissal of the newspaper's equal protection claim. The Third Circuit held:

> *We believe the allegations,* accepted by the district court as setting forth the equal protection claim, *may be read to claim that the D.E.R. has been discriminating between news-seekers, granting access to those favorably disposed to it while denying access to those whom it considers unfriendly.* Moreover, at oral argument before us, the Times leader represented that there was reason to believe that there had been D.E.R. discrimination between newsgatherers since the district court's decision. *Given the seriousness of this claim and the public interest in having it resolved on its merits, we conclude that the judgment should be vacated and the case remanded to the district court.*[8]

Like the plaintiff in *Capital Cities Media,* Mr. Jersawitz has challenged governmental discrimination among newsgatherers. The Respondents admit that they discriminated against Mr. Jersawitz solely on the basis of his employment status.[9] Without the slightest inquiry into

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7 Slip Op. at 20.

8 Slip Op. at 28 (emphasis added).

9 R. 127.

whether he presented a security risk,[10] the Respondents denied him access to interview a critic of U. S. foreign policy.[11] These uncontroverted facts support the inference[12] that the government is "discriminating between newsseekers, granting access to those favorably disposed to it while denying access to those whom it considers unfriendly."

Under the Third Circuit's analysis in *Capital Cities Media*, "the seriousness of this claim and the public interest in having it resolved on the merits" warrant the application of stringent equal protection analysis. Yet, the Eleventh Circuit cavalierly affirmed summary judgment against Mr. Jersawitz' equal protection claim on the theory that it lacked "constitutional magnitude."[13]

2. Mr. Jersawitz' Journalistic Endeavors Deserve Equal Protection.

The Respondents strain to justify this extraordinary treatment of a valid equal protection claim by arguing that —in contrast to freelancer Robert Sherrill (the plaintiff who challenged his exclusion from White House press facilities in *Sherrill v. Knight*)—Mr. Jersawitz is not "a bona fide journalist."[14] The Respondents' argument sug-

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10 R. 127-128.

11 R. 8-9.

12 Despite this inference, the district court disposed of Mr. Jersawitz' claim on a motion for summary judgment. 610 F. Supp. at 538. This grant of summary judgment was improper because "[O]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

13 783 F.2d at 1534.

14 Memorandum for the Respondents in Opposition, at 5, n. 2.

gests that this equal protection challenge should be resolved by the rote application of a Latin label.

This Court has repeatedly observed that equal protection guarantees applied in the context of newsgathering protect the *substance* of what journalists do, not the status, class, or profession of journalists.[15] This interpretation is perfectly consistent with James Madison's articulated purpose in drafting the speech-press clause.[16]

The record here shows what Mr. Jersawitz *does:* he produces television public affairs programming for a potential audience of 115,000 television viewers in the city of Atlanta.[17] Some viewers rely on Mr. Jersawitz's programming for information of unique importance to citizens who participate in the process of informed and enlightened self-government.[18] His efforts to gather and to broadcast information regarding the views of a critic of government policy are exactly what the First Amendment was designed to protect.

That Mr. Jersawitz performs his journalistic endeavors without pecuniary motive hardly reflects on his "bona

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[15] The First and Fourteenth Amendments do not guarantee the *public* a right of access to information generated or controlled by government, nor do they guarantee the press any basic right of access superior to that of the public generally. The Constitution does no more than assure the public and the press equal access once government has opened its doors. *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978) (Stewart, J., concurring).

[16] Madison justified the speech-press clause as a means of restraining the abuse of power by public officials. 1 Annals of Congress 432-42 (J. Gales ed. 1789), *reprinted in* 5 *The Writings of James Madison* 370-89 (G. Hunt ed. 1904).

[17] R. 110.

[18] R. 115-116.

fides" as a journalist. More importantly, the absence of commercial purpose in no way undermines the constitutional protection accorded the flow of information generated by Mr. Jersawitz' efforts. Therefore, one is hard put to reconcile the Eleventh Circuit's conclusion that press access regulations designed to assure "objective or accurate reporting by responsible newsmen" present no claim of "constitutional magnitude" with the Third Circuit's contrary holding in *Capital Cities Media* or the D.C. Circuit's contrary holding in *Sherrill*.

The Respondents urge this Court to rationalize this significant conflict by adopting the government's definition of "bona fide journalist": one who gathers and reports news with commercial intent or pecuniary motive. The First Amendment supports no such distinction. The equal protection clause forbids the government from enforcing such a distinction absent *compelling* justification. In this case, the government has failed to establish even a *rational* justification. Thus, the decision below warrants review.

Respectfully submitted,

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